BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NANG THACH	)	
Claimant	)	
V.	)	
	)	Docket No. 1,073,117
FARMLAND FOODS	)	
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the August 19, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Thomas J. Walsh, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 15, 2015, with exhibits attached; Evidentiary Deposition of Manuel Gustavo Diaz-Fina, from July 12, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

This is the second appeal in this claim on the issue of whether claimant's injury arose out of and in the course of his employment with respondent. After new evidence was presented in the form of the deposition testimony of Manuel Diaz-Fina, the ALJ denied claimant's request for compensation, determining that, although claimant's activities during his break fall within the personal comfort doctrine, he still must show some nexus between his accident and risks associated with his employment. In this instance, the ALJ did not believe claimant's moving his motorcycle from a handicapped parking spot in which he was

parked illegally, to a legal parking spot arises out of a risk associated with his employment.

Claimant appeals, arguing his conduct was not a departure from his employment, an abandonment of his employment or something so unusual or unreasonable that his conduct could not be considered an incident of employment. Claimant argues he was doing what he was supposed to do, was allowed to do on his company break, and, at the time of his accident, he was complying with company rules and policies that required him to move his motorcycle. Therefore, the Board should reverse the ALJ's Order and find the accident compensable.

Respondent contends claimant's injury arose out of a neutral or personal risk and did not arise out of his employment. Additionally, respondent contends the evidence does not establish a causal connection between the accident and claimant's employment. Claimant simply lost control of his motorcycle and fell over. This could have happened anywhere and nothing about claimant's work caused this accident. Finally, claimant's accident does not fall under the personal comfort doctrine and compensation should be denied.

The issue on appeal is whether claimant's injury arose out of his employment with respondent. It has been acknowledged, for preliminary purposes, claimant's accident arose in the course of his employment with respondent.

FINDINGS OF FACT

The Board has summarized the evidence in some detail and, rather than unnecessarily repeat the facts again, the Board will adopt its fact recitation contained in its March 23, 2016, Order.

Before deposing Mr. Manuel Diaz-Fina, Director of Human Resources, Packaged Meats Division, for Smithfield Foods (formerly Farmland Foods) it was determined that the Human Resources Director for claimant's location at the time of claimant's accident, no longer works for respondent and Mr. Diaz-Fina is the current HR Director for that location.

Mr. Diaz-Fina, confirmed that he was present in place of respondent's former HR Director and had complied with the subpoena request to bring the following documents: all Farmland Foods plant written policies, memos, or other plant writing, electronic or otherwise, pertaining to the rules and regulations, for the Farmland Foods plant at 2323 South Sheridan, Wichita, Kansas, as pertaining to any aspect of employee breaks and employee parking lot usage. Mr. Diaz-Fina has worked for respondent for 15 years and was aware claimant had an accident on January 29, 2015.

Mr. Diaz-Fina was able to locate information regarding the parking policies. He did not locate anything regarding the policies on work breaks, but he was confident in his knowledge of the polices so he did not attempt to locate anything in writing regarding work

breaks. He indicated that the union contract contains the written policies on work breaks. He also indicated a copy of the union contract is either given to the employees or is reviewed with the employees and a copy is kept in the HR office.

According to the union contract, an employee that clocks in a minute after their scheduled work time, is docked a half a point. Should an employee accumulate enough points, he or she would be subject to discipline up to termination. The union contract on page seven discusses working hours and breaks. According to the contract, an employee is allowed a fifteen minute paid break and a thirty minute unpaid lunch break for an eight hour work day and a ten minute break after lunch and before the end of the day, if they work over eight hours. This second break is not guaranteed for working over eight hours. At the time of claimant's accident, he was taking his fifteen minute before lunch break. Employees do not have to clock out during the thirty minute lunch break. The employees have to clock out at the beginning and end of their shift. Mr. Diaz-Fina indicated employees are allowed to leave the premises for their thirty minute lunch break and their fifteen minute break so long as they return to the premises by the end of the break.

Mr. Diaz-Fina indicated that everything pertaining to work breaks is contained in the employee handbook. There is nothing in the handbook about what employees can do, where they can go or who they can associate with on their break.

Mr. Diaz-Fina acknowledged that employees having breaks is a benefit to the employer, as it allows the employee to be rested and more efficient in their job. Mr. Diaz-Fina understood claimant was on his break on January 29, 2015, while he was in the parking lot. He agreed claimant was not in violation of company policy, as employees are allowed to spend their breaks wherever they want.

Mr. Diaz-Fina testified that if an employee violates company rules regarding parking on multiple occasions, they would be subject to discipline beyond a warning. He indicated that although the policy handbook indicates a employee's car would be towed if parked in violation of the policy, that would not actually happen. He testified the potential for towing is there, but not enforced.

Mr. Diaz-Fina testified that he expected claimant to respect the rules and that meant if he were in violation of the parking policy then he should move his vehicle, but if he did not, his vehicle would most likely not be towed. He testified they "never tow anybody", and, if there is a problem, then a conversation is had with the employee about the parking policy. That usually takes care of the problem. All policies are to be followed even though the only reprimand may be counseling.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(d) states:

(d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2014 Supp. 44-508(g) states:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Respondent does not dispute that this accident occurred while claimant was in the course of his employment. Claimant was at work, he had clocked in and was still on the clock, he was on respondent's premises and was on a sanctioned, paid break.

The disputed issue is whether this accident arose "out of" claimant's employment with respondent. This question was addressed in the Board's Order of March 23, 2016. Very little has changed in this record since that Order was issued. The addition of the deposition of Mr. Diaz-Fina provided little enlightenment to this question. Claimant was on a sanctioned break, on respondent's property, doing what he had the legal and policy right to do, *i.e.*, move his motorcycle from a handicapped parking spot to an allowed spot. However, this record does not support the contention claimant would have been disciplined, beyond a conversation with his supervisor, nor would his motorcycle have been towed from the spot. Mr. Diaz-Fina made it clear respondent does not tow vehicles, even if they are wrongfully parked.

As noted in the Board's earlier Order, the modifications to the Kansas Workers Compensation Act (Act) in 2011, significantly changed the risks associated with working on the job in Kansas and what is to be allowed as compensable and what not. The causal connection between the conditions under which the work is required to be performed and the resulting accident remain.

Claimant's errand of moving his motorcycle to a non-handicapped parking spot remains a personal or neutral risk, and is not compensable under the Act. Claimant has failed to prove his accident arose "out of" his employment with respondent. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[1] K.S.A. 2015 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove his accident arose "out of" his employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant dated August 19, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge